Supreme Court, U.S.
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No. 86-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM BARBER, DAVID TARTER, and
RAYMOND BRADLEY,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT, AMERICAN AIRLINES INC., IN OPPOSITION TO PETITION

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26 pp

QUESTION PRESENTED

I. WHETHER THE RECORD BELOW CONTAINS LEGALLY INSUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDINGS IN FAVOR OF THE PETITIONERS ON THEIR CLAIMS OF AGE DISCRIMINATION?

LIST OF PARTIES

The Petitioners are Jim Barber, Raymond Bradley and David Tarter.

The Respondent is American Airlines, Inc. Affiliated entity: AMR Corporation (parent)

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BRIEF OF RESPONDENT, AMERICAN AIRLINES, INC., IN OPPOSITION TO PETITION

Respondent, American Airlines, Inc. ("American") submits this brief in opposition to the petition for certiorari filed by Jim Barber, David Tarter, and Raymond Bradley ("petitioners").

STATEMENT OF THE CASE

American adopts the statement of the case as contained in the opinion of the Court below.

SUMMARY OF PETITION

The petitioners raise here one issue, which is not meritorious. The petitioners claim that the Eighth Circuit held, in the opinion below, that a plaintiff bringing suit under the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. § 621 *et. seq.* must demonstrate as part of his prima facie case in a reduction-in-force context that the employer favored employees outside of the protected age group; and the petitioners argue that the decision of the Eighth Circuit below is directly in conflict with the decisions of other Courts of Appeals on the same issue and that there is a discernible split amongst the circuits regarding the nature of proof required to prove a prima facie ADEA case in a reduction-in-force context.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Court of Appeals decision addressing the issue presented, none of which involves an unsettled question of federal law. Accordingly, the petition fails to satisfy this Court's traditional criteria for review.

While the petitioners contend that the Eighth Circuit held that a plaintiff in an ADEA reduction-in-force case must demonstrate as part of his prima facie case that the employer favored employees outside the protected age group, even a cursory examination of the opinion below shows that was not the basis of the Eighth Circuit's decision in favor of American. The Eighth Circuit decided, rather, that there was simply no legally sufficient evidence to sustain the jury verdict in favor of the petitioners in the trial court, inasmuch as the petitioners own proof showed that the alleged favored employees were substantially the same age as the petitioners.

Further, the petitioners seemingly would have this Court adopt a standard by which a jury verdict for the plaintiffs in an

ADEA case arising out of a reduction-in-force would have to be sustained if the plaintiffs simply showed that they were affected by the reduction-in-force, that they were in the protected group, and that the allegedly favored employees were younger by any amount than the plaintiffs. An examination of the decisions of this Court, as well as the decisions of the Courts of Appeals, show that the quantum or type of proof necessary to prove a prima facie case in any given ADEA case will vary in accordance with differing factual situations with which a court is confronted.

The petitioners simply misperceive the focus of the holding of the Court below, which was not upon the standard of proof required for an ADEA plaintiff to prove a prima facie case of discrimination in a reduction-in-force case. The Court below simply focused, after reading "every page of the testimony at this trial," on whether the evidence was legally sufficient to support the jury's finding that the petitioners' age was the determining factor with reference to American's decision to not allow the petitioners to "bump" (i.e., displace) qualified ticket agents in Little Rock, Arkansas, at the time of the reduction-in-force.

REASONS FOR DENYING THE WRIT

The issue presented by the petitioners does not satisfy this Court's traditional criteria for certiorari. The Eighth Circuit Court's decision is fully consistent with every relevant Court of Appeals decision addressing the issues presented. Moreover, the issue does not involve an unsettled question of federal law.

The petitioners have seriously misconstrued, if not misstated, the holding of the Court below. In its opinion, the Eighth Circuit identifies two areas of proof adduced by the petitioners in the trial court in an attempt to show age discrimination. The first involves an episode in which the petitioners claim that American had permitted other employ-

ees, who they claim were no more skilled than the petitioners, to remain in Little Rock in the past in a similar reduction-in-force situation. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d 658, 659-660 (8th Cir. 1986). The Eighth Circuit rejected this event as proof of age discrimination because the employees who were allegedly favored in the past by American were "reasonably close in age to the plaintiffs themselves." *Id.* at 660. The ages of the allegedly favored employees ranged from forty-six to fifty-four, while the ages of the petitioners were forty-nine, fifty-one and fifty-eight, at the time the petitioners claim American discriminated against them on account of their age. *Id.* at 659-660. Curiously, the petitioners now claim that they never intended this evidence as proof of age discrimination (petition for writ of certiorari, p. 4 n.1).[1]

Rather, for the first time, the petitioners now claim that they rely only upon one episode in the proof below to demonstrate age discrimination sufficiently to support the jury verdict, to-wit: the fact that the employees whom they would have bumped in 1983, had American permitted them to do so, were younger than the petitioners.[2] Specifically, the three ticket agents who were permitted to remain in Little Rock were forty-five to forty-eight years of age. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 660. Moreover, as the Eighth Circuit observed, the employee who would have been "bumped" first was forty-eight years old, almost the same age as the petitioner

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[1] American would note in passing that this position is in complete conflict with that taken by the petitioners in the Court below. (Appellees' Brief, pp. 5-6, 10, 13, 18)

[2] It is quite telling that the Appellees failed to make a single reference to this evidence in the Court below. The Appellees' Brief is devoid of any mention of these agents or their ages, and the Appellees never advanced this evidence in the Court below or the trial court as being any proof whatsoever of age discrimination. Indeed, the Appellees failed to offer proof of the ages of these agents at trial; instead, American did so. (App. 429, 659, 666-667)

Tarter. *Id.*, at 660. The Eighth Circuit held that this evidence was not proof of age discrimination because "the employees whom plaintiffs wished to displace were substantially the same age as plaintiffs themselves." *Barber, et al. v. American Airlines, Inc.*, 791 F.2d at 660. The Eighth Circuit did not hold that it was incumbent upon the petitioners to prove that the alleged favored employees were outside the protected age group, in order to prove a prima facie case of discrimination, or in order to make out a fact issue for the jury. In fact, the petitioners cannot point to a single line or phrase in the opinion of the Eighth Circuit to substantiate their claim in this Court. Instead, the petitioners have quoted portions of the opinion of the Eighth Circuit out of context, in an apparent attempt to mislead this Court as to the holding of the Eighth Circuit. In sum, an examination of the decisions of this Court and of the other Courts of Appeals shows that the decision below is in harmony with those of this Court, the other Courts of Appeals, and with other Eighth Circuit decisions.

The petition in this case demonstrates a fundamental misunderstanding by the petitioners of this Court's opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), inasmuch as the petitioners would have this Court adopt only one circumstance in which the fourth element of a prima facie case for discrimination in an age setting could be proven in a reduction-in-force context. (*McDonnell* involved a claim of racial discrimination under Title VII, but its analytical scope is applied also in age discrimination. *Holley v. Sanyo Mfg., Inc.* 771 F.2d 1161, 1164 (8th Cir. 1985)). In *McDonnell*, this Court noted:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required

> from respondent is not necessarily applicable in every respect to differing factual situations." [3]

Id.. at 802.

Likewise, it has been held that *McDonnell* is not the alpha and omega of possible tests in the age discrimination context. *McCorstin v. U. S. Steel Corp.*, 621 F.2d 749, 753 (5th Cir. 1980). In fact, the petitioners have seriously misperceived the analytical approach taken by the Eighth Circuit in determining whether a plaintiff has produced the requisite quantum of proof to make out a prima facie case of age discrimination or to make

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[3] The prima facie evidence test announced in McDonnell consisted of the demonstration of four factual, objective elements: (i) that he [complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. It is the fourth prong of this test that has been varied by the appellate courts on a case-by-case basis in ADEA cases; and it is this fourth element that is raised as an issue herein by the petitioners. Thus, American will confine its argument to this element. The exact nature of this fourth component can vary from one age case to the next. For example, if the plaintiff has been replaced, he may show that his replacement was substantially younger. *Maxfield v. Sinclair Intern* 766 F.2d 788 (3rd Cir. 1985), *cert. denied,* U.S. , 106 S. Ct. 796 (1986); on the other hand, if the claimant has lost his job due to a reduction-in-force, then he may show this fourth element by varying means, such as showing that the employer retained employees substantially younger than the plaintiff. *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983) *cert. denied,* 464 U.S. 937 (1983). For the purposes of this brief, American does not believe that it is important to focus on reduction-in-force cases, as opposed to non-reduction-in-force cases. Rather, the focus here is the question of whether the favored employee, who either replaced the plaintiff or who was retained instead of the plaintiff, must be within or without the protected group.

out a jury issue in any age discrimination case. The decisions of this Court and the Courts of Appeals make it abundantly clear that the plaintiff's burden will vary from case to case, depending upon the facts presented. This approach has been succinctly stated by the Eighth Circuit:

> "Further, the factually-oriented, case-by-case nature of the ADEA claims requires that we not be overly rigid in our consideration of the evidence of discrimination a plaintiff may offer."

Holley v. Sanyo Mfg., Inc., 771 F.2d at 1166. *See also, Moses v. Falstaff Brewing Corp.*, 550 F.2d 1113, 1114 (8th Cir. 1977).

An examination of the various authorities cited by the petitioners in their petition reveals that the requisite quantum of proof does indeed vary on a case-by-case basis. First, many of the decisions of the Courts of Appeals hold that an ADEA plaintiff may prove the fourth element of a prima facie case, in a reduction-in-force case, or otherwise, by showing that the favored employees were younger than the complainant. However, most of those cases reveal that the evidence must show, at the very least, that the favored employee is *substantially* younger than the plaintiff. For example, the proof in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) showed that at least one, if not all three, of the younger, favored employees were outside the protected age group and that all of the alleged favored employees were *substantially* younger than the age discrimination plaintiff. The Fifth Circuit in *Thornbrough* held that the plaintiff proved a prima facie case of discrimination by showing that younger employees were retained in a reduction-in-force (the proof offered by the plaintiff also demonstrated that the younger employees were less qualified than the plaintiff). The *Thornbrough* court also cautioned that the necessary elements of a prima facie employment discrimination case vary depending on

the facts of a particular case. Significantly, the Court below specifically recognized and addressed the holding in *Thornbrough,* but held that the *facts* in this case distinguished it from *Thornbrough. Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 661.

Likewise, the Third Circuit has observed in *Maxfield v. Sinclair Intern.,* 766 F.2d at 792-793 that the age difference between the plaintiff and the so-called favored, younger employee must be substantial:

> "Although replacement by someone younger, without more, will not give rise to an inference of age discrimination, it has been noted that a substantial difference in the ages may be circumstantial evidence that gives rise to that inference."
>
> * * *
>
> "Moreover, we see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive of discrimination but is merely one element in a set of circumstances that may give rise to an inference of discrimination."

Accord, Loeb v. Textron, Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

The Eleventh Circuit has held that the mere fact that one employee is replaced with another who is younger does not, without more, give rise to an inference that age was even considered in the decision to dismiss or demote the first employee. Instead, the Eleventh Circuit has noted that the discrimination prong of the prima facie case *could be* established by showing that a plaintiff was replaced by a *substantially* younger employee with equal or inferior qualifications. *Goldstein v. Manhattan Industries, Inc.,* 758 F.2d 1435, 1443 (11th Cir. 1985) *cert. denied,* U.S. , 106 S. Ct.

525 (1985) (emphasis supplied). *See also, Pace v. Southern Ry. System,* 701 F.2d 1383, 1386 (11th Cir. 1983), *cert. denied,* 464 U.S. 1018 (1983) (no evidence of discrimination when a fifty-one-year-old employee was demoted and replaced by a forty-nine-year-old employee; also holding that the *McDonnell* test is not the sole method of establishing a prima facie test case of age discrimination).

The Third Circuit, in *Massarsky v. General Motors Corp.,* 706 F.2d 111 has held that in a reduction-in-force situation a plaintiff may prove a prima facie case when it is shown that, among other things, the favored employee who was retained was, "considerably younger in age" than the ADEA plaintiff. Likewise, in *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393 (3rd Cir. 1984), *cert. denied,* U.S. , 105 S. Ct. 592 (1984) the Court found that the plaintiff had established a prima facie of age discrimination by showing that the alleged favored employee was *significantly* younger than the ADEA plaintiff and by showing that the employer saved a considerable amount of money by laying off the plaintiff, instead of the favored employee.

Other cases holding that there must be a substantial age difference between the ADEA plaintiff and the favored, younger employee are as follows: *Palmer v. U.S.,* 794 F.2d 534 (9th Cir. 1986); *Haskell v. Kaman Corp.,* 743 F.2d 113 (2nd Cir. 1984); *Jackson v. Shell Oil Co.,* 702 F.2d 197 (9th Cir. 1983); *Douglas v. Anderson,* 656 F.2d 528 (9th Cir. 1981); *Schwager v. Sun Oil Co. of Pennsylvania,* 591 F.2d 58 (10th Cir. 1979).

In addition, many courts have held that there must be a showing of not only a substantial age difference between the plaintiff and the favored, younger employee, but also something more. *Palmer v. U.S.,* 794 F.2d at 534 (replacement by a substantially younger employee with equal or inferior qualifications); *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d at

1393 (favored employee significantly younger, plus company saved money by laying off the plaintiff and retaining the younger, favored employee); *Douglas v. Anderson,* 565 F.2d at 528 (replacement by a substantially younger employee with equal or inferior qualifications); *Dace v. ACF Industries, Inc.,* 722 F.2d 374 (8th Cir. 1983) (plaintiff replaced by a substantially younger employee, which resulted in a savings of money to the employer); *Coburn v. Pan American World Airways, Inc.,* 711 F.2d 339, 343 (D.C. 1983), *cert. denied,* 464 U.S. 994 (1983) (younger persons were retained and others later promoted). *See also, Thornbrough v. Columbus and Greenville R. Co.,* 760 F.2d at 633 (substantial age difference and younger employees were less qualified than the plaintiff); *Laugesen v. Anacondia Company,* 510 F.2d 307, 313 n.4 (6th Cir. 1975) ("...we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.") This trend has been cogently summarized by the Eleventh Circuit:

> "We agree with the tenor of these cases insofar as they establish that replacement by one within the protected category will not preclude proof of a prima facie case. However, in no case does this court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the protected group, was adversely affected by an employment decision, was qualified and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there also was other evidence of discrimination based on age. In *Moore* the district court explicitly found that the plaintiff had produced sufficient statistical data of discrimination to preclude summary judgment. That the plaintiff had been replaced by one younger yet still in the protected class was only an additional ground for finding that a prima facie case had been established. In *Spagnuolo,* the Fourth Circuit affirmed a judgment for a ADEA

> plaintiff who had not only shown that he was replaced by someone thirteen years younger but within the protected group but also had presented direct evidence of purposeful discrimination by the defendant. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1113. In *Douglas,* though a directed verdict for the defendant was affirmed, the Ninth Circuit held that the plaintiff had made out a prima facie case. The plaintiff had shown that he was replaced by someone younger than himself, yet within the protected age group, and also had presented 'substantial evidence of satisfactory job performance.' *Douglas v. Anderson*, 656 F.2d at 533. The Ninth Circuit noted that an inference of age discrimination can be established when all other elements of a McDonnell Douglas/Price test are established but, instead of replacement by one outside the protected group, the plaintiff 'was replaced by a substantially younger employee with equal or inferior qualifications.' *Id.,* at 533 (emphasis supplied). The court aptly observed that '[i]f the replacement is only slightly younger than the plaintiff, then it is less likely that an inference of discrimination can be drawn.' *Id.* In *Douglas,* the replacement was only five years younger than the plaintiff but the substantial evidence of qualifications of the plaintiff served to heft the plaintiff over the line between failure and success in establishing a prima facie case. A prima facie case may be established only when there is a basis for inferring that discrimination is the reason for the employment decision and in none of the cases discussed was the fact that the replacement was younger than the plaintiff enough, standing alone, to give rise to that inference."

Pace v. Southern Ry. System, 701 F.2d at 1390.

At page 10 of their petition, the petitioners represent to this Court that the Fourth and Seventh Circuit Courts of Appeals are in conflict with the other circuits by holding that an ADEA

plaintiff must show that the favored employee is outside the protected age group.[4] This representation is fallacious. First, the statement by the Fourth Circuit in *E.E.O.C. v. Western Elec. Co., Inc.* 713 F.2d 1011 (4th Cir. 1983) that it was incumbent upon the EEOC to prove that, upon the claimants' demotions, persons outside the protected age class were retained is merely dicta and is not necessary to the holding of the case, which was that the plaintiff failed to rebut the employer's legitimate nondiscriminatory business reasons for its actions. Moreover, in *Western Electric* the Fourth Circuit recognizes that an ADEA plaintiff could make out a case of discrimination by producing "other evidence that [the employer] did not treat age neutrally in its demotion selections." *Id.*, at 1011. Additionally, the test articulated by the Fourth Circuit in its dicta in the foregoing case is merely one, but not the only, method of proving a prima facie case. *McCuen v. Home Ins. Co.*, 633 F.2d 1150, 1151 (5th Cir. 1981); *Douglas v. Anderson*, 656 F.2d at 532; *Maxfield v. Sinclair Intern.*, 766 F.2d at 792 n.1; *see also, McCorstin v. U.S. Steel Corp.*, 621 F.2d at 753. More telling, the petitioners have failed to inform this Court that the Fourth Circuit has recognized that an ADEA plaintiff may prove age discrimination when the younger, favored employee was within the protected group. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 n.3 (4th Cir. 1982).

The petitioners have also flatly misstated the holdings of the Seventh Circuit in *Trembath v. St. Regis Paper Co.*, 753 F.2d

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[4] The petitioners also claim that the opinion below is in conflict with two earlier Eighth Circuit cases — *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); and *Cova v. Coca-Coca Bottling Co.*, 574 F.2d 958 (8th Cir. 1978). American believes that the foregoing discussion amply refutes this assertion.

603 (7th Cir. 1985) and *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985). In *Trembath,* the entire focus of the Court's opinion was that the plaintiff failed to prove a prima facie case because he did not establish that there was an available job open for which he applied at the time he was terminated. In *Tice,* the Seventh Circuit did not hold that the ADEA plaintiff must show that he was replaced by an employee outside the protected group; rather, the sole issue before the Court was whether the plaintiff was replaced by a younger employee. Once again, the petitioners fail to cite other Seventh Circuit authority that clearly holds that a plaintiff may raise an inference of age discrimination by showing that the younger, favored employee was within the protected age group, but that the younger, favored employee must be substantially younger than the plaintiff. *La Montagne v. American Convenience Products, Inc.,*750 F.2d 1405 (7th Cir. 1984); *Stumph v. Thomas & Skinner, Inc.,* 770 F.2d 93 (7th Cir. 1985).

The foregoing authorities make it abundantly clear that whether dealing with a reduction-in-force case or a non-reduction-in-force case, in order to create an inference of discrimination or a fact issue of discrimination, the ADEA plaintiff may do so by producing evidence of, among other things, favorable treatment of a *substantially* younger employee. The decision of the Court below is in accord with the foregoing decisions, as it found that the alleged favored employees were substantially the same age as the petitioners.

Moreover, the foregoing authorities do not set forth the only means by which a plaintiff may make out a prima facie case of age discrimination. A plaintiff may also prove a prima facie case by production of evidence, circumstantial or direct, from which the fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Holley v. Sanyo Mfg., Inc.,* 771 F.2d at 1166; *Williams v. General Motors Corp.,* 656 F.2d 120 (5th Cir. 1981) *cert. denied,* 455 U.S. 943

(1982); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090-1091 (6th Cir. 1984) (plaintiff may establish a prima facie case of discrimination by producing evidence that his age was a factor in his termination); *McCorstin v. U.S. Steel Corp.*, 621 F.2d at 754 (evidence of a pattern of terminating older workers allows an inference that age played a role in [complainant's] discharge); *see also, Goldstein v. Manhattan Industries, Inc.*, 758 F.2d at 1443 (whether a prima facie case has been shown in any given situation is essentially a factual question). The reasons for these varied approaches to ADEA cases is found in the legislative history of the Act:

> "The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions."

H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); Reprinted [1967] U.S. Code Cong. & Ad. News (92 Stat.) 213, 220.

Inasmuch as the ADEA is factually oriented, many cases must stand or fall on their own facts. It is exactly this factually oriented, case-by-case analysis that was at work in the decision below.[5] As set forth above, the petitioners now focus on one event as providing evidence for discrimination, and that is the episode in which younger employees within the protected age group were retained by American at Little Rock. The ages of those employees ranged from forty-five to forty-eight, while the ages of the petitioners were forty-nine, fifty-one and fifty-eight at the time they were reduced in force. At first glance, one may question (although the petitioners do not do so) whether or not

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[5] It should also be borne in mind that the Court below did not hold that the petitioners failed to prove a prima facie case of discrimination, but rather, it studied the record as a whole, with a view of determining whether the evidence was legally sufficient to support the jury's findings in favor of the petitioners. *Barber, et al. v. American Airlines, Inc.*, 791 F.2d at 659-660.

an age difference of forty-five (the age of the youngest allegedly favored employee) versus fifty-eight (the age of the oldest petitioner) raises such a substantial difference in age so as to constitute evidence of age discrimination. However, an examination of the facts in this case reveals that it does not. The opinion of the Eighth Circuit makes it clear that the alleged favored employee who would have been "bumped" first and thus required to leave Little Rock was Jim Hicks, who was forty-eight years old, almost the same age as the petitioner Tarter. *Barber, et al. v. American Airlines, Inc.,* 791 F.2d at 660. It was not American that picked the order in which the so-called favored employees would have been bumped; but rather, it was a seniority system to which petitioners make no challenge.

Moreover, there are other facts in the record that are most significant with reference to the so-called younger, favored employees. First, after the petitioners were reduced in force at Little Rock in 1983, there were only seven full-time agent positions in all classifications remaining in Little Rock, with those positions being in freight, the airport ticket office, the city ticket office, and vacation relief (App. 666-668). Included in those seven agents were the three alleged favored agents. All seven agents were high in seniority and received the same salaries as the petitioners (App. 683), with the exception of one of the seven agents who received between four to seven cents an hour less than the others (App. 68 -684). No matter which agents remained in or left Little Rock, American would have saved no money, except for the four to seven cents an hour with reference to the one remaining agent.[6] Thus, this evidence

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[6] On a forty-hour week, this would have amounted to a yearly savings of between $83.20 to $145.60; however, American would have experienced a net loss because it was obligated to (and did, in Tarter's case) pay moving expenses, plus a $12,500 moving bonus in Mr. Tarter's case (App. 426, Plaintiff's Exhibit 13).

removes the considerations at work in *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d at 1393 and in *Dace v. ACF Industries, Inc.,* 722 F.2d at 374, wherein the employer saved money by favoring the younger employee. Likewise, there is absolutely no dispute that the alleged younger, favored employees who remained in Little Rock after the reduction in force in 1983 were fully qualified, efficient, capable agents in January of 1983 (App. 308, 430). These facts negate the possibility that the younger, favored employees had qualifications that were equal or inferior to those of the petitioners. *See, Palmer v. U.S.,* 794 F.2d at 534; *Thornbrough v. Columbus and Greenville R. Co.,* 760 F.2d at 642; and *Douglas v. Anderson,* 656 F.2d at 528. This is especially true in light of the petitioners' admissions that they would have needed training in order to become fully qualified in January of 1983, in order to become efficient ticket agents, the job into which they wished to "bump," thereby replacing the incumbents in those positions. (App. 280-282, 299, 301, 372, 374, 380-381, 414, 502-522).

In sum, the real holding of the Eighth Circuit was that in light of the evidence presented to it, there was no legally sufficient evidence to support the jury's finding that the petitioners' age was a determining factor with reference to any employment action American took towards the petitioners:

> "In reviewing a judgment entered on the verdict of a jury, we are mindful that we must view the evidence in the light most favorable to the party winning the verdict, here plaintiffs, according them the benefit of every reasonable inference that can be drawn from the evidence, and setting aside the verdict only if the evidence points all one way. *Dace, supra,* 722 F.2d at 375-76. We have carefully read every page of the testimony at this trial, and we are persuaded that this stringent standard has been met. The jury could rationally have believed that plaintiffs ought in good conscience to have been permitted to stay in Little

> Rock, and that American had violated its own personnel practices in demanding their transfer, but there is absolutely no substantial evidence in this record that would justify attributing American's actions to plaintiffs' age."

Barber, et al. v. American Airlines, Inc., 791 F.2d at 660-661.

The foregoing shows that there is simply no conflict between the various Courts of Appeals as to the standard of proof required of an ADEA plaintiff. Indeed, the circuits recognize, as does this Court, that the standard will vary with the factual setting; and they recognize that the favored employee can be within or outside the protected age group. They also recognize that there must be, at the very least, a substantial age difference between the claimant and the favored employee, if not also other evidence of discrimination based on age. The Court below held that based upon its review of the record, which revealed that the alleged favored employees were substantially the same age as the petitioners, "there is absolutely no substantial evidence in this record that would justify attributing American's actions to plaintiffs' age." *Id.,* at 661. Thus, the petitioners are actually asking this Court to review the entire record below and to make its independent determination as to whether or not there is legally sufficient evidence to support the jury's finding. However, that simply is not the function of this Court. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938) (granting of a writ would not be warranted merely to review the evidence or inferences drawn from it); *United States v. Johnston,* 268 U.S. 220 (1925).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-333

JIM BARBER, DAVID TARTER, and
RAYMOND BRADLEY,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

CERTIFICATE OF SERVICE

I Thomas L. Case, a member of the Bar of this Court, hereby certify that on this 19th day of September, 1986, three copies of the Brief in Opposition of Respondent, American Airlines, Inc., in the above-entitled case were mailed, first class postage prepaid, certified mail return receipt requested, to Mr. Philip Kaplan, Kaplan, Brewer & Miller, P.A., Metro Centre Mall, 415 Main Street, Little Rock, Arkansas 72201, counsel for the Petitioners. I further certify that all parties required to be served have been served.

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